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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 781

ROBERT F. URBANO,

Petitioner,

against

THE READER'S DIGEST ASS'N, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

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December 23, 1968

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Jurisdiction

The order of affirmance of the United States Court of Appeals for the Second Circuit is dated September 17, 1968 and was entered by the Clerk of that Court on September 17, 1968. A motion of petitioner, Robert F. Urbano, for a stay of the mandate or for recall of the mandate and a stay of the reissuance thereof pending application for certiorari was denied by the Court of Appeals on December 10, 1968.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes Involved

The texts of New York Civil Rights Law § 74 and of 28 U.S.C. § 1915(d) are as set forth at page 3 of the petition.

New York Civil Practice Law and Rules § 208:

> "If a person entitled to commence an action is, at the time the cause of action accrues, under the age of twenty-one years, insane or imprisoned on a criminal charge or conviction for a term less than for life, and the time otherwise limited for commencing the action is three years or more and expires no later than three years after the disability ceases, or the person under the disability dies, the time within which the action must be commenced shall be extended to three years after the disability ceases or the person under the disability dies, whichever event first occurs; if the time otherwise limited is less than three years, the time shall be extended by the period of disability. The time within which the action must be commenced shall not be extended by this provision beyond ten years after the cause of action accrues, except where the person was under the age of twenty-one years. This section shall not apply to an action to recover a penalty or forfeiture, or against a sheriff or other officer for an escape."

New York Civil Practice Law and Rules § 215:

> "The following actions shall be commenced within one year:
>
> " * * *

"3. an action to recover damages for assault, battery, false imprisonment, malicious prosecution, libel, slander, false words causing special damages, or a violation of the right of privacy under section fifty-one of the civil rights law;

"• • • •"

Questions Presented

The following questions are presented in this action:

(1) Whether the dismissal of a libel action against the author of a magazine article as "frivolous", after examination by the court of extensive documentary evidence submitted by both sides, is *res judicata* as to a subsequent libel action against the publisher who employed the author and who supported and paid for the defense of the earlier libel action;

(2) Whether the defense of truth is established as a matter of law where the plaintiff has in great detail, and on several occasions, confessed to the truth of every allegedly defamatory statement;

(3) Whether the alleged inability of plaintiff to file a complaint *in forma pauperis* during the period September 17, 1964 to March 11, 1966 suspends the running of the one year limitation period throughout the entire period from November 25, 1963, when the cause of action accrued, to November 1, 1966 when the complaint was filed;

(4) Whether a magazine article that was published without malice and that faithfully reports the contents of an official report of the Federal Bureau of Investigation con-

cerning bank robberies stated to have been committed by plaintiff is privileged as a matter of law; and

(5) Whether any damages can be recovered in this action in the absence of a showing of malice.

Statement of the Case

This is a libel action based on an article appearing in the December 1963 issue of "Reader's Digest" magazine, which was and is published by defendant-appellee in the State of New York. The article was written by Frederic Sondern, Jr. and was entitled "The New-Style Bank Robber." The only statement in the article quoted in the numbered allegations of the complaint is the sentence:

> "His admitted ten bank and two department-store robberies netted him some $200,000."

The answer alleged affirmatively, among others, the defenses of truth, the one year New York statute of limitations, defendant's privilege to publish a fair and accurate report of an official report issued by the Federal Bureau of Investigation, defendant's lack of malice, and plaintiff's prior bad reputation (25a).* Defendant's motion for summary judgment was based on these defenses. In addition, defendant's motion sought leave to assert the additional defense of *res judicata* based on a judgment dismissing as "frivolous" an earlier action entitled *Urbano* v. *Sondern*, 41 F.R.D. 355 (D. Conn. 1966), *aff'd.* 370 F.2d 13 (2d Cir.), *cert. denied* 386 U.S. 1034 (1967).

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* Citations with the suffix "a" are to the appendix to appellant's appendix in the Court of Appeals.

The judgment appealed from unanimously affirmed an order of the district court granting defendant's motion for summary judgment on the statute of limitations defense, *res judicata,* and lack of subject matter jurisdiction (3a-6a). By holding that it was apparent "to a legal certainty that the plaintiff cannot recover an amount in excess of $10,000" the district court also implicitly recognized the legal merit of the defenses of truth, privilege, lack of malice, and prior bad reputation, and gave judgment thereon.

POINT I

The decision below was clearly correct.

The courts below correctly held that this action is barred by *res judicata.* The moving affidavit shows in paragraphs 6 and 7 that *Urbano* v. *Sondern* was a libel action brought against the author of the same article involved in the instant action (40a-41a, 63a). Pursuant to decision rendered June 27, 1966, the complaint in *Urbano* v. *Sondern* was dismissed as "frivolous" on June 29, 1966 (41 F.R.D. 355). The opinion of District Judge Zampano shows that Mr. Urbano was given every opportunity to be heard on his libel claims and that he submitted long affidavits. The Court of Appeals affirmed this dismissal on the grounds stated in the district court's opinion, and on the additional ground that plaintiff could not surmount the defenses of privilege and truth. *Urbano* v. *Sondern,* 370 F.2d 13 (2d Cir. 1966), *cert. denied* 386 U.S. 1034 (1967). In view of this determination the courts below in the present case properly refused to permit Mr. Urbano to relitigate his claim of being libeled by the article by bringing the same claim against a new defendant. There is no longer any

requirement for mutuality of estoppel under New York law. *B. R. DeWitt, Inc.* v. *Hall,* 19 N.Y.2d 141, 225 N.E.2d 195 (1967).

The evidence was overwhelming, moreover, that the article was true insofar as it referred to plaintiff. The affidavits of FBI agents O'Neil and Klingler, dated April 16 and April 19, 1965 respectively, show that on September 13 and 14, 1960, plaintiff admitted in writing the commission of ten bank robberies (67a-75a). The signed and witnessed statements of plaintiff admitting these robberies in great detail are attached as exhibits to these affidavits (e.g. 69a-73a). Plaintiff's confessions of two department store robberies and admissions that he obtained $175,000 to $200,000 in the course of his robbery activity are shown in subsequent affidavits of special agents Klingler and O'Neil dated April 5, 1966 (86a-87a). Several other confessions were made orally by Mr. Urbano to several different psychiatrists, Dr. Galen, Dr. Wertham, Dr. Zigarelli and Dr. Collins (91a, 93a, 96a-97a).

The courts below also properly held that the complaint herein was barred by the one year statute of limitations. The cause of action accrued no later than November 25, 1963 with the publication of the December 1963 issue of "Reader's Digest" (120a). Almost a year later, on September 17, 1964, Mr. Urbano signed his first complaint against The Reader's Digest Association and petitioned for leave to file it *in forma pauperis* (8a-9a).* On November 9, 1965 District Judge Cannella refused to permit Mr. Urbano to file the first complaint against The Reader's Digest

* This first complaint was not served on defendant.

Association *in forma pauperis* (126a). That refusal was predicated on the decision of the district court in *Urbano* v. *News Syndicate Co., Inc.,* 232 F.Supp. 237 (S.D.N.Y. 1964) that plaintiff lacked capacity to sue. Plaintiff states that after Judge Cannella refused to permit the filing of the complaint against the Reader's Digest *in forma pauperis* he "decided to abandon the action" in the Southern District of New York and to bring an action against the author in Connecticut (126a). On March 11, 1966 the Court of Appeals in *Urbano* v. *News Syndicate Co., Inc.,* 358 F.2d 145 (2d Cir.), *cert. denied* 385 U.S. 831 (1966) reversed the district court and held that plaintiff did have capacity to sue. Despite that ruling plaintiff waited another 7 months, until October 27, 1966, before again attempting to file a complaint in the Southern District of New York against this defendant (21a). Even if it be accepted that plaintiff was unable to sue *in forma pauperis* during the period September 17, 1964 to March 11, 1966, the fact remains that there was a delay of 10 months from November 25, 1963, when the cause of action accrued, to September 17, 1964, when the plaintiff first attempted to file the earlier complaint against The Reader's Digest Association, Inc., and there was an additional delay of 7 months from March 11, 1966, when the Court of Appeals decided that Mr. Urbano had capacity to sue, until October 27, 1966, when he again attempted to proceed by filing a complaint *in forma pauperis* against this defendant. Thus there was a total delay of 17 months.

There is no provision of law suspending the limitations period for any person who claims that he is unable to pay the court's filing fee or who is serving a life sentence. New York Civil Practice Law and Rules § 208 provides in relevant part:

> "If a person entitled to commence an action is, at the time the cause of action accrues * * * imprisoned on a criminal charge or conviction for a term less than for life and * * * if the time otherwise limited is less than three years, the time shall be extended by the period of disability * * *."

It is clear from this that the disability of imprisonment extends the limitations period only if the plaintiff is imprisoned for a term less than for life. Since plaintiff has been sentenced to life imprisonment (62a), his imprisonment does not extend the limitations period.

Plaintiff's claim is also barred by the defense of privilege. The article faithfully reports the facts set forth in the FBI report upon which it is based (compare 16a-17a with 77a-83a). The article was written without malice, in the belief in its truth, and there was never a request for any retraction (101a-104a).

Under New York Civil Rights Law § 74 there is a privilege to report the official statements of investigating authorities. *Bridgwood* v. *Newspaper PM, Inc.*, 276 App.Div. 858, 93 N.Y.S.2d 613 (2d Dept. 1949); *Baumann* v. *Newspaper Enterprises, Inc.*, 270 App.Div. 825, 60 N.Y.S.2d 185 (2d Dept. 1946); *cf. Hogan* v. *New York Times Co.*, 211 F.Supp. 99, 107 (D.Conn. 1962), *aff'd.* 313 F.2d 354 (2d Cir. 1963); *Kenna* v. *Daily Mirror, Inc.*, 250 App.Div. 625, 629, 295 N.Y.S. 219 (1st Dept.), *aff'd.* 276 N.Y. 483, 12 N.E.2d 168 (1937).

Plaintiff's damages are virtually non-existent, since his reputation was destroyed long before the publication complained of herein. His reputation was destroyed by his conviction of burglary in the first degree (48a), by the testi-

mony of his own witness in 1960 that he admitted "that he had robbed before, and that he had received money from 'ill gotten gains' before" (93a), by his signed confessions to 10 bank robberies (e.g. 69a-73a), by his admission of murder (91a-93a), *Urbano* v. *State of New Jersey,* 225 F.Supp. 798, 802 (D.N.J.), *affd.* 333 F.2d 845 (3d Cir.), *cert. denied* 377 U.S. 958 (1964), by his conviction of felony murder and sentence to life imprisonment (62a), by the distribution to the news media of the FBI report of September 14, 1961 (76a), and by the numerous news articles that were published prior to the publication complained of here (59a).

POINT II

Petitioner has shown no ground for granting certiorari.

The petition shows no conflict between the decision of the Court of Appeals and any other decision of any court.

CONCLUSION

For the reasons given it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Of Counsel:
WENDELL DAVIS, JR.

December 23, 1968